

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-662

JILIN ZHANG

vs.

DIRECTOR OF THE DEPARTMENT OF UNEMPLOYMENT ASSISTANCE & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Jilin Zhang appeals from a District Court judgment affirming the final decision of the Department of Unemployment Assistance (DUA) to deny her unemployment benefits. We affirm.

Background. The following facts are drawn from the decision of the review examiner and are supported by substantial evidence. From October 29, 2008, until January 5, 2016, Zhang worked for Riley Power, Inc. (Riley). In November, 2015, Riley informed Zhang that due to the lack of work, it was eliminating her position as a senior engineer in the computational fluid dynamics (CFD) group.² The two other engineers, both male, in the CFD group were retained (one full time, one half time).

¹ Riley Power, Inc.

² At the time, Zhang was approximately twenty-one weeks pregnant with her second child. In connection with her first pregnancy in 2010, Zhang had received short term disability benefits and had taken time under the Family Medical Leave Act.

Riley offered Zhang a lateral transfer to a position in the boiler design group where she would work in the same facility with the same pay, title, and benefits. While Zhang pondered the offer, she pursued other Riley job opportunities. Riley, however, canceled a job Zhang interviewed for in the fuel equipment design (FED) group and denied Zhang's alternate proposals for her future role at Riley.³ At a meeting between Zhang, her attorney, and two human resources (HR) employees on December 21, 2015, Zhang informed Lindsey Drawbridge, the HR generalist, that she (Zhang) had no "passion" for boiler design work and did not want to learn the job. Given the choice between the boiler design job, i.e., the only senior level engineering position available at Riley at the time, or separation, Zhang gave her notice on the following day.

After an earlier review examiner affirmed the DUA's initial disqualification decision, the DUA board of review (board) remanded Zhang's case for a de novo hearing.⁴ The review examiner after the de novo hearing issued detailed findings of fact to underpin her determination that Zhang's separation was voluntary. On the issue of Zhang's motivation, the review

³ The CFD group was a subgroup of the larger FED group.

⁴ The board concluded that Zhang, a pro se party, had not received a fair hearing because the earlier review examiner had not assisted Zhang in fleshing out the evidence related to her discrimination claims.

examiner found that Zhang left Riley because she was "dissatisfied with being expected to work outside her field of expertise [i.e., CFD]" to which she had dedicated her entire career, and "was not open to accepting work outside of her prior specialization, despite the employer's efforts to maintain her employment." The review examiner ultimately concluded that Zhang had not met her burden of demonstrating that she left work for good cause attributable to Riley or for "urgent, compelling, and necessitous reasons." G. L. c. 151A, § 25 (e) (1), & third par. The board granted Zhang's application for review, conducted a complete record review, and affirmed the decision of the review examiner, as did the District Court judge on judicial review.⁵ See G. L. c. 151A, §§ 40, 41 (b), 42. This appeal followed.

Discussion. On appeal, Zhang first argues that she believed she had compelling personal reasons that forced her to leave her job: the potential physical harm caused by a stressful transfer to a new job for which she lacked qualifications. A departure for "urgent, compelling, and necessitous" reasons is deemed involuntary (citation omitted).

⁵ Although Zhang was represented by counsel at the de novo hearing, she filed her second appeal to the board pro se. As part of that appeal, she submitted numerous documents that had not already been introduced in evidence, including, as herein relevant, an internal "Manpower Required" forecast for the CFD group.

DiGiulio v. Director of the Dep't of Unemployment Assistance, 94 Mass. App. Ct. 292, 294 (2018). "Th[is] statutory exception to disqualification sets a standard calling for an exercise of judgment which is not purely factual . . . [and] involv[es] the application of the standard to the facts found, bring[ing] into play the experience, technical competence, and specialized knowledge of the agency." Director of the Div. of Employment Sec. v. Fingerman, 378 Mass. 461, 463 (1979). We must view the agency's determination as to whether an employee came within this exception with "considerable deference." Norfolk County Retirement Sys. v. Director of the Dep't of Labor & Workforce Dev., 66 Mass. App. Ct. 759, 766 (2006).

Substantial evidence supported the review examiner's conclusion that Zhang did not leave work because of health concerns.⁶ As the review examiner found, consistent with Zhang's testimony, no health care provider advised her to reject the transfer offer, and she did not discuss the potential impact of the new position on the health of her child with her doctor, "as would be expected if she had sincere concerns regarding this topic." Zhang neither sought leave at any time before her departure nor informed Riley of her belief that the transfer

⁶ She had suffered a miscarriage, undisclosed to Riley, while she was working on a high pressure CFD project.

posed a health risk.⁷ Zhang's December 17, 2015, electronic mail message (e-mail) explaining why she could not and would not do the boiler design job was noticeably silent about health concerns. It was undisputed that short-term disability was available in the event a medical condition arose upon transfer; and as the review examiner reasoned, given her prior use of it, it was unreasonable for Zhang to "be unaware of her potential eligibility for a leave."

Next, Zhang maintains that because she met the requirements of the statutory exception to disqualification provided by G. L. c. 151A, § 25 (e) (1), she was entitled to unemployment benefits. We conclude that substantial evidence supported the review examiner's findings and conclusion that the boiler design position was "suitable," Zhang resigned in lieu of accepting it, and Zhang did not establish that her departure was for good cause attributable to her employer.

As the review examiner noted, Zhang met the educational and experience requirements of the position. The tasks of the boiler design group engineer, the review examiner could reasonably have found, were fairly similar to those performed by a CFD engineer; and the boiler design role offered to Zhang was closer to her CFD role than the one in the FED group that she

⁷ The latter finding was supported by the testimony of Drawbridge as well as some of Zhang's testimony.

sought.⁸ To the extent that Zhang maintained that she lacked the skills and knowledge for the job, Riley offered to provide her with any training she needed to feel comfortable in her new role. Zhang, moreover, acknowledged she would not be expected to work independently immediately upon transfer. At the time she resigned, she had successfully completed work on a boiler design project to Riley's satisfaction. The review examiner could have inferred that the data processing work (which required no prior boiler design experience) did not render the job unsuitable for a senior engineer, but was assigned in order to give Zhang time to ease into the position. An e-mail sent on the day before her resignation established that the manager of the boiler design group offered his support and assistance to Zhang in connection with her new assignment.⁹

The review examiner was warranted in rejecting Zhang's claim that she left because of a reasonable belief that she was the victim of discrimination. It is not probative of

⁸ The review examiner found that Zhang's proposal to work half-time in two new jobs (FED and boiler design) was "inconsistent with an individual who is concerned with the potential [health] risk of learning the tasks associated with just one position."

⁹ As he left for the day on December 21, 2015, the manager told Zhang "not to worry about the tight schedule." He informed Zhang that her job was "to help out where she c[ould] and [to] get some additional training and experience in Boiler Design programs/procedures." He promised to meet with her the following morning. Zhang completed the assignment and handed in her work before she left Riley.

discrimination that the majority of the ninety-two engineers at Riley were male. Since 2010, at least ten women at Riley had taken and returned from maternity leaves (three twice).¹⁰ No other complaints of gender discrimination had been made. The review examiner found, on conflicting evidence, that Zhang first accused Riley of discrimination on December 17, 2015 (five days before she gave notice).

To the extent that Zhang allegedly perceived discriminatory motive in Riley's offer of the full-time FED job to a male candidate and its cancellation of the job, the review examiner credited the testimony of Drawbridge and Fred Pyne, the vice-president of engineering, that the reason for the cancellation was low workload, and that no one was hired to fill the FED position. Finally, substantial evidence supported the review examiner's finding that Zhang was not singled out for transfer because she was Chinese, female, and pregnant, but solely for the reason that the two male engineers retained were better able to manage the CFD team and to support the various engineering groups.¹¹ Where, as here, factual findings are supported by

¹⁰ It was undisputed that after Zhang returned to work from her maternity leave in 2010, Riley promoted her.

¹¹ There were at least five engineering groups with fluctuating staff levels due to the ebb and flow in workloads. The CFD group manager had the most experience of the three engineers in that group. Drawbridge testified that Zhang lacked sufficient tenure with Riley or experience for that position. The other male engineer retained half time in the CFD group had superior

substantial evidence, we may not make different credibility choices, draw different inferences, or supplant the findings with our own. See Leone v. Director of the Div. of Employment Sec., 397 Mass. 728, 731 (1986).

None of Zhang's remaining arguments provides grounds for disturbing the judgment. Zhang correctly points out that in order to avoid disqualification, she was not required to request a leave of absence before resigning. However, our case law makes clear that whether an employee took reasonable steps to preserve employment is a "[p]rominent" factor in the calculus. Norfolk County Retirement Sys., 66 Mass. App. Ct. at 766. The review examiner thus did not apply incorrect legal principles by considering Zhang's failure to explore her leave options before her departure, especially where she had previously taken advantage of short-term disability and the Family and Medical Leave Act.

Nor are we persuaded that Zhang did not receive a fair and impartial hearing. The contents of the Massachusetts Commission Against Discrimination complaint excluded by the review examiner were largely cumulative of Zhang's live testimony. See Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 138 (2002). Zhang failed

academic credentials and several years of work experience prior to starting employment at Riley. Zhang had no prior professional experience and had worked in the CFD group her entire career.

to demonstrate any prejudicial error in the exclusion of the three "job descriptions." First, the CFD and the boiler design documents were not job descriptions, but rather undated job postings. The FED job description postdated Zhang's employment. The review examiner allowed Zhang, who had personal knowledge of the three jobs and had viewed the boiler design job description online, to fully testify about the essential functions and responsibilities of the positions. As the review examiner pointed out, the "employer" (Pyne) was also available for questioning on this topic. To the extent that Zhang claims error in the review examiner's failure to condition the exclusion of the job descriptions on Riley's production of the proper ones, suffice it to say that Zhang's attorney failed to make this request. Any error in the exclusion of these documents did not prejudice Zhang's substantial rights. See G. L. c. 30A, § 14 (7).

The record does not support Zhang's claim that the review examiner unconditionally relied on the testimony of Riley's two witnesses. The fact that the review examiner credited their testimony on key points does not show unfairness. While Drawbridge did not have extensive interaction with Zhang, she was present at the key meeting with Zhang and her attorney on the day before her resignation, and had direct personal knowledge of key statements made by Zhang. Pyne, a senior

executive with thirty years of experience in the engineering field, was qualified to render an opinion comparing the respective jobs, and while he had no direct interaction with Zhang, he was one of the two decision makers involved in formulating the restructuring plan with his subordinates. Because Zhang had the burden of proof in this case, the duty fell upon her to subpoena and to call the necessary witnesses required to prove her case. The review examiner had no obligation to make a list of witnesses Zhang failed to call.

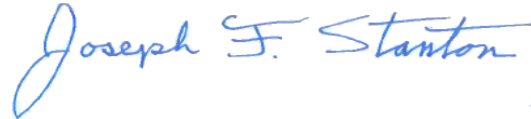
We discern no abuse of discretion in the denial of Zhang's motion for leave to present additional evidence. See G. L. c. 30A, § 14 (6). The judge could properly have concluded that Zhang had no good reason for failing to introduce it in evidence at the de novo hearing.¹² See Fanion v. Director of the Div. of Employment Sec., 391 Mass. 848, 850-852 (1984). Moreover, the judge could also have concluded that the proposed evidence was

¹² The board had instructed Zhang, who was represented by counsel at the de novo hearing, that "the parties must present their cases in full at the new hearing, and offer any necessary witnesses and documents." Notwithstanding this instruction, Zhang's attorney failed to present the evidence during any of the three administrative hearings held between August 18, 2016, and October 12, 2016.

missing key information, and thus was unreliable and immaterial to any issue in the case.

Judgment affirmed.

By the Court (Hanlon,
Desmond & Shin, JJ.¹³),



Clerk

Entered: August 14, 2019.

¹³ The panelists are listed in order of seniority.